

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| CHRISTIAN BLEISTEIN | : | DETERMINATION |
| OFFICER OF SECOND STREET DELI, INC. | : | ON REMAND |
| | : | DTA NO. 808747 |
| for Revision of a Determination or for Refund | : | |
| of Sales and Use Taxes under Articles 28 and | : | |
| 29 of the Tax Law for the Period September 1, | : | |
| 1985 through August 31, 1988. | : | |

Petitioner, Christian Bleistein, officer of Second Street Deli Inc., 356 Indian Head Road, Commack, New York 11725, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through August 31, 1988.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on November 5, 1991, continued at the same offices on October 15, 1992 at 10:45 A.M. and concluded at the same offices on December 10, 1992 with all documents to be filed by April 7, 1993 which began the six-month period to issue this determination. Petitioner filed his brief on March 5, 1993. The Division of Taxation filed a brief and a letter on January 27, 1993 and April 1, 1993, respectively. Petitioner appeared by Louis F. Brush, Esq. The Division of Taxation appeared by William F. Collins (Gary Palmer, Esq., of counsel).

On August 11, 1994 the Tax Appeals Tribunal remanded the case to the Administrative Law Judge for an analysis of issues II through IV set forth below.

ISSUES

I. Whether the execution of a consent to the fixing of tax due pursuant to Tax Law § 1138(c) bars petitioner from challenging the accuracy of the sales tax audit.

II. Whether certain periods were barred by the statute of limitations because the consents

to extend the statute of limitations were executed pursuant to an invalid power of attorney.

III. Whether the Division of Taxation properly determined petitioner's sales and use tax liability.

IV. Whether penalties and interest in excess of the minimum, which were imposed against petitioner, should be waived.

FINDINGS OF FACT

Second Street Deli, Inc. ("Deli") was a delicatessen which was located in a busy business district. It had 12 tables, two cash registers and a long counter. There were four or five people who worked behind the counter. Petitioner, Christian Bleistein, was Deli's president.

On September 7, 1988 an auditor called petitioner and told him that the delicatessen was going to be audited for a three-year period. Petitioner replied that his accountant, Mr. Forman, should be contacted.

On September 8, 1988 the auditor called Mr. Forman and explained that the Deli was being audited for sales tax. The auditor gave Mr. Forman an overview of the books and records that would be required for the audit.

In a letter dated September 8, 1988, the Division advised Mr. Forman that the audit of the Deli's sales and use tax returns was scheduled on October 11, 1988. The cover letter requested all of the Deli's books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns and exemption certificates. The second page of the letter set forth an extensive list of records requested for the audit. Among other items, the Division asked for guest checks and cash register tapes for the period "[t]o be determined".

On October 11, 1988, the auditor and Mr. Forman met at the Nassau District Office. During their meeting, the auditor and the accountant reviewed the Deli's general ledger, Federal tax returns, purchase invoices and deposit slips. In addition, the accountant left the auditor with purchase invoices that covered a two-month period. However, the accountant did not produce

any cash register tapes or a day book which listed the Deli's sales and sales invoices. The Division concluded that petitioner's records were inadequate to conduct a detailed audit since there was no substantiation of the sales figures.

In the course of its examination, the Division compared the Deli's sales shown on its Federal income tax return with the sales recorded on its books. For the period ending in December 1987, the sales reported on petitioner's books exceeded the sales reported on the Federal income tax returns by \$6,811.76. The Division also found that during the entire audit period, the sales reported on the books exceeded the sales reported on the returns by \$2,122.28.

On October 13, 1988 the Division received a power of attorney form which appointed Mr. Forman to appear on behalf of the Deli. The box designated for the signature of a corporate officer bears petitioner's signature, his corporate title and the date of October 3, 1988.

Mr. Forman placed his name in a box for the signature of a witness and entered the date of October 4, 1988. The other box for the signature of a witness was left blank. He also signed the form as a notary public and entered the same date. Mr. Forman signed the bottom of the form as the appointed representative and checked the box stating he is a public accountant enrolled with the New York State Education Department.

Initially, the Division considered performing a markup test. In accordance with this plan, the Division examined purchase invoices for April 1987 and October 1988. The examination revealed that the purchase records for April 1987 were adequate. However, the October 1988 purchase invoices were \$20,000.00 less than that recorded in the general ledger. The inadequacy of the purchase invoices caused the Division to decide to perform an observation test.¹

Prior to conducting the audit, the Division went to the Deli and obtained the prices of every taxable item that was sold. The prices were either posted on a board or were obtained

¹It is noted that the field audit report contains a checkmark in a box which states that the purchase records were adequate. This box was checked because the person who wrote the report was not familiar with the case.

from Mr. Bleistein. During this meeting, petitioner told the auditor that the Deli did not close any days during the year.

Before the observation test was performed, petitioner was told that if he disagreed with the results of the observation because the day selected was not representative, the Division would perform a second unannounced observation test on a different day of the week. The results of

the first observation test would then be averaged with the results of the second observation test.

The observation test was performed on Monday, April 3, 1989. At the hearing the auditor explained that the Division does not usually conduct observation tests on a Monday because, in its experience, sales are commonly lower in the beginning of the week than the end of the week.

April 3, 1989 started out as a rainy day. Later the sky was overcast. The temperature was in the 50's.

The observation test was conducted by two auditors who were at the store at the same time for most of the day including the busy periods. However, one auditor started and finished earlier than the other auditor. By recording sales as they occurred, the auditors found total taxable sales of \$1,373.39² and gross sales of \$2,096.59.

At the conclusion of the observation, the auditor discussed the findings, including the tax, with petitioner. Petitioner responded that it was a representative day and that he agreed with the audit findings. At another juncture he said it was a slow day because of the rain. In addition, petitioner and Mr. Forman were offered an opportunity for a second observation test. Petitioner responded that he was not interested in a second observation test.

The Division divided the total taxable sales by the gross sales which were found during the observation test, in order to calculate a taxable ratio of 65.53 percent. The taxable ratio was

²The workpapers erroneously use the figure of \$1,373.99.

used to examine what petitioner was reporting. It was not used to calculate the tax due.

In order to calculate the amount of taxable sales, the Division initially multiplied the taxable sales found during the observation test by seven to determine the amount of taxable sales during a week. The Division proceeded on the premise that the Deli was open seven days a week because petitioner stated that it was open for this period. Later, petitioner's accountant requested that the tax be recalculated as if the business was open six days a week since the Deli does not have as much business on a weekend as it does during the week. The Division agreed to this request and recalculated the amount of tax due. It then advised Mr. Forman of the result.

In response to the Division's proposal, Mr. Forman mailed a letter dated April 15, 1989 to the auditor which requested adjustments pertaining to delivery equipment and a leasehold expense. Mr. Forman also stated:

"I discussed the matter of days open to business with the taxpayer. This business is located in a business district. There is no reason to be open past the afternoon on Saturdays. I feel you should use a 5½ day week, not a 6 day week.

"Will you kindly recompute the tax giving the taxpayer credit for the above, and mail the corrected bill to me."

In order to recompute the amount of tax due, the Division projected the amount of taxable sales over a five and one-half day period and then multiplied that figure by 13 to calculate the amount of taxable sales in a quarterly period. The amount of taxable sales in a quarterly period was multiplied by four to calculate the amount of taxable sales in a year. The annual taxable sales were then multiplied in two successive steps by 95 percent in order to allow for a five percent inflation rate for the prior two years.³ On the basis of this procedure, the Division calculated total taxable sales, without catering, of \$1,120,922.39.

The Division asked for the Deli's books and records on catering. Petitioner provided the

³The auditor's notes indicate that the United States Department of Labor reported an inflation rate of 3.3% in 1986, 5.1% in 1987 and 4.1% in 1988.

auditor with a catering menu. However, no catering records were available.

The Division concluded that, since the business had menus for catering, approximately 10 percent of the Deli's taxable sales arose from catering. The 10 percent estimate was based on office experience and on the auditor's experience in examining delicatessens.

Total audited taxable sales were obtained by adding the audited taxable sales from the Deli and the catering sales. The total audited taxable sales were then reduced by the reported taxable sales to determine the additional taxable sales. The Division divided the additional taxable sales by the reported taxable sales to calculate an error ratio of 262.22 percent. Thereafter, the Division, in succession, multiplied the reported taxable sales by the error rate and the tax rate to determine that tax was due in the amount of \$71,560.55.

The Division also determined that tax was due on the purchase of fixed assets on which no taxes were paid resulting in tax due of \$351.99. The amount of tax due was based on a detailed examination of petitioner's records which showed that no tax was paid for a computer which cost \$3,299.30 and that an invoice for \$1,100.00 was missing.

The Division concluded that omnibus penalty was due because the amount of tax found due on audit was 25 percent greater than the amount of tax reported.

The Division determined that petitioner was responsible for the taxes due from the Deli. The Division reached this conclusion because petitioner was the sole officer of the Deli, held himself out as president and signed the Federal tax returns. The Division also considered the fact that petitioner operated the business and was at the business premises on a daily basis. Further, petitioner signed checks and, as president, he signed the power of attorney form.

On June 15, 1989, the Nassau District Office received a signed Statement of Proposed Audit Adjustment. At the top of the page the statement was addressed to "Second St. Deli., Inc. c/o Mr. Joseph Forman, 77-05 220th St., Bayside, N.Y. 11364. The statement was dated May 1, 1989. Below the address, the statement contained the following explanation:

"The statement of Proposed Audit Adjustment is based on the information indicated by the box checked above. If you agree that a sales and/or use tax as

detailed below is due and payable to the State Tax Commission, please sign one copy of this statement and return it to this office within 30 days. Appropriate penalty and/or interest will continue to accrue until full payment is made.

"If you DISAGREE with this statement, please return one copy of this statement along with a precise explanation of your disagreement, to this office within 30 days.

"Failure to either agree or disagree to this Statement of Proposed Audit Adjustment within 30 days of the statement date will result in the issuance of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due."

The document next listed a series of quarterly periods which ended November 30, 1985 through August 31, 1988, inclusive, and set forth the amount of tax due for each respective period. At the bottom of the column, the total tax of \$71,912.54 was listed. A line bracketed each of the quarterly tax amounts and contained the statement "Penalty & Interest To Be Computed". Beneath the column setting forth the asserted amount of tax, the statement contained the following paragraph:

The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this statement constitutes such a consent. **YOU MAY CONSIDER AN APPROVAL OF THIS MATTER FINAL IF YOU ARE NOT NOTIFIED TO THE CONTRARY WITHIN 60 DAYS FROM THE DATE THE SIGNED CONSENT IS RECEIVED BY THE DEPARTMENT.** (Emphasis in original.)

At the bottom of the page, there are boxes for signature, title and date. The box for signature bears an "X" and petitioner's signature. The title is listed as "Pres." and the document is dated May 10, 1989. On June 15, 1989, the Division received a second Statement of Proposed Audit Adjustment, which was signed by petitioner as president. This statement was identical to the first one except that only penalty was listed across from the corresponding periods. In addition, the box for dating the signature was left blank.

The records of the Division show that, on June 15, 1989, the Division received a check dated June 12, 1989 which was drawn on the account of Second Street Deli, Inc. The check was signed by petitioner and made payable to the order of the "N.Y.S. Sales Tax Bureau" in the amount of \$35,000.00.

On the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 26, 1989, to petitioner, as president of Second Street Deli., Inc., for the period September 1, 1985 through August 31, 1988. The notice assessed tax of \$71,912.54 plus penalty of \$19,757.69 and interest of \$20,684.65 for a total amount due of \$112,354.84.

In the course of its audit, the Division received a series of consents to extend the period of limitation for assessment of sales and use taxes. The first consent was signed by petitioner on November 25, 1988. It permitted the assessment of sales and use taxes for the period September 1, 1985 through December 31, 1985 until on or before March 20, 1989. The second consent was signed by Mr. Forman on February 10, 1989 and permitted the assessment of sales and use taxes for the period September 1, 1985 through February 29, 1986 until on or before June 20, 1989. On June 10, 1989 Mr. Forman signed a consent which permitted the assessment of sales and use taxes for the period September 1, 1985 through February 29, 1987 at any time on or before September 20, 1989.

During the audit period, the Deli reported the following taxable sales:

| Quarter <u>Ending</u> | Taxable <u>Sales</u> |
|-----------------------|----------------------|
| November 1985 | \$23,116.00 |
| February 1986 | 25,640.00 |
| May 1986 | 26,830.00 |
| August 1986 | 25,940.00 |
| November 1986 | 28,830.00 |
| February 1987 | 27,314.00 |
| May 1987 | 28,550.00 |
| August 1987 | 27,918.00 |
| November 1987 | 28,690.00 |
| February 1988 | 29,418.00 |
| May 1988 | 31,040.00 |
| August 1988 | 37,120.00 |

It is the Division's experience that reported taxable sales increase after the Division contacts a taxpayer about an audit.

At the time of the hearing, petitioner had known Mr. Forman for about eight years. On the basis of a recommendation, petitioner met Mr. Forman just before petitioner became

associated with the Deli. Mr. Forman told petitioner that he had a lot of experience with delicatessens. Petitioner has been satisfied with Mr. Forman's services and it was petitioner's wish that Mr. Forman represent him during the audit.

Mr. Forman told petitioner to keep a day book, receipts from bills and receipts from what the Deli pays its drivers. However, Mr. Forman never told petitioner to keep the backup to the day book. It was petitioner's practice to write a figure from the cash register tape into the day book and then destroy the tape.

At the hearing, petitioner testified that on the day that the observation test was conducted, the store's volume was 60% higher than usual. Petitioner explained that the 60% increase was attributable to two factors - Mondays are a busier day because the courts in the area are in session and, petitioner's main competitor, which was a sandwich shop located around the corner, was closed. Petitioner estimated that of the 60% increase in volume, 20% was due to the fact that it was a Monday and 40% was due to the competition being closed.

Petitioner further testified that beginning in January 1988 and ending during the second week of May 1988 the Deli was completely remodeled. The renovations included a new ceiling, new counters, new tables and a new floor. The renovated store also had a large salad counter and a steam table. In addition, the seating capacity increased from 24 to 48 patrons.

The Deli had to be closed for a certain number of days because of the renovations. However, upon completion, the remodeling resulted in increased volume.

Petitioner also explained that at or about the time of the renovation, new office buildings were built around the corner and a new three-story super structure was built across the street in the other direction. Petitioner contends that the new buildings, the remodeling and the increased seating capacity affected his taxable ratio because more people were coming in for lunch.

Petitioner also testified that the Deli provides catering only to small office parties and that on some weeks the Deli did not do any catering business. On other weeks it might cater two or three events. Petitioner estimated that during the audit period, the Deli averaged \$100.00 a

week in catering business.

Lastly, petitioner maintained that by the end of 1989, the recession caused business to fluctuate. Further, petitioner submitted that if there had not been a recession, business would have been better.

ADDITIONAL FINDINGS OF FACT ON REMAND

During her first few years as an auditor, the individual who conducted the audit herein was primarily involved with auditing delicatessens. At the hearing, she could not recall the exact number of delicatessens that she audited. However, she knew that it was more than 10 and was uncertain whether it was more than 25. All of the delicatessens were in Nassau County.

Second Street Deli, Inc. was located in Mineola, New York.

In the process of calculating its error rate to determine tax due, the Division estimated that catering sales were \$112,092.24 over a period of four quarters. The estimated amount was based on 10 percent of total taxable sales (see, Findings of Fact "18" and "20").

Petitioner offered an affidavit of a John Kramer which stated that he was a clerk at the Deli on April 3, 1989 and that he had been employed as a clerk at the Deli from prior to September 1, 1985 through 1989. His normal business hours were Monday through Friday, 6 A.M. to 6 P.M. Mr. Kramer states that his duties in the delicatessen included waiting on customers, working on take-out orders, preparing sandwiches and salads and ringing up sales including prepackaged food items.

Mr. Kramer asserts that during the course of his employment at the Deli, Mondays were at least 20 percent higher in volume than other days of the week due to the nature of the Court activity in the area. Mr. Kramer also stated that he noticed that on April 3, 1989 the Deli's main competitor, the Main Street Sandwich Shop, was closed. According to Mr. Kramer, the business volume for prepared foods on April 3, 1989 was at least 40 percent higher than would be normal for a Monday due to a competitor being closed. On the basis of the foregoing, Mr. Kramer estimates that the volume for prepared foods on April 3, 1989 was at least 60

percent higher than normal because of the additional activity that takes place on Mondays and the additional activity that occurred because a competitor was closed.

Mr. Kramer also states that he is familiar with the catering business done by the Deli and that, during the period September 1, 1985 through August 31, 1988, the catering business averaged approximately \$400.00 to \$500.00 a month.

Mr. Kramer further asserts that, due to extensive remodeling of the Deli, there was a dramatic increase in the consumption of prepared foods in the summer of 1988. It is alleged that this increase continued into 1989 due to the remodeling and the occupancy of additional office space in the area that had been created by the construction of new buildings and the remodeling of existing buildings. Mr. Kramer estimated that on April 3, 1989 sales were 12 percent to 18 percent higher than they were during the period September 1, 1985 through August 31, 1988.

Lastly, Mr. Kramer states that the Deli was closed the equivalent of four weeks a year due to vacation, taking inventory and holidays.

The Division noted a downward trend in reported taxable sales in the sales tax quarters subsequent to August 31, 1988. The reported taxable sales during the quarter ended May 31, 1989 were \$35,580.00 and the reported taxable sales during the quarter ended August 31, 1989 were \$32,946.00.

SUMMARY OF THE PARTIES' POSITIONS

In his brief, petitioner raises three arguments. First, petitioner argues that the audit methodology was not reasonably calculated to determine the amount of sales and use taxes due. Specifically, petitioner argues that the Division failed to consider that the Deli's main competition was closed, and that the observation test took place on a Monday; that there was an increase in customers due to the occupancy of additional office space since the end of the audit period; that catering sales were approximately \$100.00 a week and that the Deli was closed four weeks a year. On the basis of the foregoing, petitioner recalculated the tax liability to determine an 8% error rate. It is then submitted that this figure is too small to make a change in the tax

liability.

In regard to the penalties, petitioner submits that since the tax due, if any, is de minimis, no penalties should be assessed. In the alternative, petitioner argues that any error was due to the accountant and not petitioner and therefore it would be inequitable to charge the Deli or petitioner with a penalty. Lastly, petitioner argues that the statute of limitations expired for the quarters ending November 1985, February 1986 and May 1986. This argument continues that Mr. Forman signed a consent to extend the statute of limitations pursuant to a power of attorney in which Mr. Forman notarized petitioner's signature. It is contended that the power of attorney was void because Mr. Forman was not authorized to notarize the document since he was the recipient of the power and a party in interest. Therefore, it is concluded that the consent to extend the statute of limitations was void.

At the hearing, petitioner argued that it would have been more fair to compare the findings of the observation test with the sales reported during the last taxable period in order to calculate an error rate because of the increase in reported taxable sales over the audit period. Petitioner conceded that he was a responsible officer of the Deli.

In response to the foregoing, the Division submits that the audit was reasonably calculated to determine the taxes due; that Mr. Forman was authorized to represent petitioner despite the defect in the power of attorney form, and therefore the consent to extend the statute of limitations was valid; and that the consent to extend the period of limitations for the corporate assessment also extends the period of limitations for issuing an assessment against an officer. The Division also argues that the annual inflation adjustment takes into account annual increases in taxable sales. At the beginning of the hearing, the Division also raised the issue of whether the consents to fix tax were binding on petitioner.

CONCLUSIONS OF LAW

A. In their briefs, petitioners have focused on the underlying audit. However, before the audit is addressed, the impact of the consent signed by petitioner must be discussed. Tax Law § 1138(c) provides as follows:

"A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

Neither party has disputed the fact that petitioner signed the consent. Through his signature petitioner manifested an intention to take advantage of the provisions of Tax Law § 1138(c) and have the tax finally and irrevocably fixed. Further, as a concededly responsible officer, petitioner is liable, pursuant to Tax Law §§ 1131(1) and 1133(a) for the tax due from the Deli. Thus, by the terms of the Tax Law, through his signature petitioner became bound pursuant to Tax Law § 1138(c) to the terms of the consent (see, Matter of BAP Appliance Corp., Tax Appeals Tribunal, May 28, 1992).

B. Assuming that the consent to fix tax was not binding, the next question which arises is whether certain periods were barred by the statute of limitations because the consents to extend the statute of limitations were executed pursuant to an allegedly invalid power of attorney.

C. The record shows that on October 13, 1988 the Division received a power of attorney form which appointed Mr. Forman to appear on behalf of the Deli. On this form, Mr. Forman notarized Mr. Bleistein's signature and signed the form as the appointed representative. The record also shows that Mr. Forman signed consents to extend the statute of limitations, dated February 10, 1989 and June 10, 1989, which extended the time for assessing sales and use taxes. As noted, it is petitioner's position that the consents to extend the statute of limitations are invalid because the power of attorney was a nullity.

D. At the time the power of attorney in question was issued, 20 NYCRR former 600.1(a) provided:

"No attorney or agent shall appear on behalf of any person before, or be recognized by, any officer or employee of the Department of Taxation and Finance in any proceeding, as hereinafter defined, unless such attorney or agent appears with the taxpayer or files a power of attorney, in proper form, or a certified copy thereof, from the taxpayer involved therein authorizing the attorney or agent to represent him."

E. The form for a power of attorney was prescribed by 20 NYCRR former 600.5.

Subdivision (c) of this section concerned the acknowledgement and stated:

"Acknowledgment. The power of attorney must be acknowledged before a notary public or, in lieu thereof, witnessed by two disinterested individuals."

F. On its face, the foregoing section does not preclude a notary public from notarizing the signature of an individual on a form which appoints the notary to appear on that individual's behalf.

G. Powers and duties of notaries public are governed by the Executive Law. Section 135 of the Executive Law provides, in part:

"Every notary public duly qualified is hereby authorized and empowered within and throughout the state to administer oaths and affirmations, to take affidavits and depositions, to receive and certify acknowledgements or proof of deeds, mortgages and powers of attorney and other instruments in writing"

As set forth above, section 135 of the Executive Law expressly authorized Mr. Forman to acknowledge Mr. Bleistein's signature on the power of attorney form at issue herein.

H. Relying upon a rule published by the Secretary of State, which prohibits a notary from acting if the notary is a party or pecuniarily interested in the transaction, and Armstrong v. Combs (15 App Div 246, 44 NYS 171), petitioner contends that the notary had an interest in the transaction and therefore the power of attorney was a nullity. Petitioner's argument is rejected. In Armstrong v. Combs (*supra*) the Court held that the acknowledgement of an assignment of a bond and mortgage taken by one of the assignees was a nullity. The Court concluded that a party to the record was disqualified from taking the acknowledgement.

I. In contrast to the situation in Armstrong v. Combs (*supra*), Mr. Forman is not a party to the current tax proceeding. There is no indication in the record that Mr. Forman was an officer or employee of Second Street Deli, Inc. or that the Division is seeking taxes from Mr. Forman with respect to the activities of Second Street Deli, Inc. Accordingly, it is concluded that Mr. Forman does not have an interest in the transaction and was not disqualified from acknowledging the signature of Mr. Bleistein. It follows that the power of attorney form appointing Mr. Forman to appear on petitioner's behalf was valid and the consents to extend the statute of limitations were not infirm.

J. Petitioner next argues that there were numerous difficulties with the results of the observation test.⁴ The first group of objections concern the particular day chosen for the observation test. On the basis of petitioner's testimony and the affidavit of Mr. Kramer, it is argued that sales were 40 percent higher on the day of the observation test because a competitor, which dealt in prepared foods, was closed. Petitioner also submits that the outcome of the observation test was at least 20 percent higher than it would have been on another day of the week because Mondays are a busier day.

K. Petitioner's testimony and affidavit are directly contradicted by petitioner's statements which were made at the time of the audit. At the conclusion of the day that the observation test was conducted, petitioner initially stated that it was a representative day and later stated that it was a slow day. Further, petitioner declined the opportunity for a second observation test. Thus, petitioner's statements and decision at the time of the observation test contradict his testimony and affidavit offered at the hearing. Under these circumstances, I am constrained to find that the statements made to the auditor at the time of the observation test are far more credible than the testimony and the affidavit offered at the hearing. Therefore, the foregoing arguments are rejected.

L. Petitioner contends that there should be a reduction of at least 12 percent because new office space in the area of the Deli resulted in additional sales volume during the period when the observation test was conducted compared to the audit period.

M. The record shows that from August of 1988 onward there was a downward trend in reported taxable sales. No explanation was offered as to why reported taxable sales were decreasing if increased occupancy of office space in the area was causing sales to increase. In view of the discrepancy, the testimony and affidavit that sales were greater at the time of the observation test is rejected as not credible.

N. On the basis of petitioner's testimony and the affidavit of Mr. Kramer, it is argued that

⁴It is noted that petitioner has not argued that the use of external indices was unwarranted.

catering sales were approximately \$100.00 a week during the audit period.

O. The record shows that since catering records were unavailable, the auditor relied upon her experience to estimate that approximately 10 percent of the Deli's taxable sales arose from catering. Total catering sales for a period of four quarters was determined to be \$112,092.24. On both direct and cross-examination, it was revealed that the auditor had prior experience in auditing delicatessens. She explained that she was primarily involved with delicatessens during her first few years as an auditor. Although she could not recall the exact number of delicatessens that she audited, she indicated that it was more than 10 and was uncertain whether it was more than 25. All of the delicatessens were in Nassau County.

P. Petitioner's position is striking inasmuch as there is an enormous difference between the level of sales from catering according to petitioner and that found by the auditor in examining other delicatessens in the same county. It is concluded that the auditor's testimony that she audited a number of delicatessens in the same county provides a reasonable basis for the 10 percent figure attributed to catering and the auditor's reliance upon office experience (see, Matter of Top Shelf Deli, Tax Appeals Tribunal, February 6, 1992).

Q. Although the level of catering sales may vary from delicatessen to delicatessen, the amount advanced by petitioner cannot be accepted because it is so far from the norm. Said conclusory allegations of error are insufficient to satisfy petitioner's burden of proof that the methodology led to unreasonably inaccurate results or the amount of tax assessed was erroneous (Matter of Del's Mini Deli v. Commissioner of Taxation & Fin., ___ AD2d ___, 613 NYS2d 967).

R. Petitioner testified that the Deli was closed four weeks a year. Mr. Kramer's affidavit also makes the same assertion. In contrast, during the audit, petitioner told the auditor that the delicatessen never closed. The difference was never addressed at the hearing.

S. I am constrained to find that the explanation during the audit that the delicatessen never closed is more reliable than the testimony at the hearing. The later position was taken after petitioner had the opportunity to consider the consequences of his statements. It is noted

that, at the request of petitioner's initial representative, the Division's calculations proceeded on the premise that the Deli was open five and one-half days a week. Considering petitioner's initial statement, this aspect of the audit appears to be very reasonable.

T. At the hearing, petitioner argued that it would have been more accurate to compare the findings of the observation test with the sales reported during the last taxable period in order to calculate an error rate because of the increase in taxable sales over the audit period.

U. The foregoing argument is rejected. The adjustments made by the Division for inflation are sufficient to prevent any unfairness which may arise from comparing the results of the observation test with the reported taxable sales during the audit period.

V. Petitioner's argument that penalties should be abated is rejected. There was a substantial underreporting in taxable sales and petitioner has not established that the audit was in error.

Petitioner's second argument, that the Deli relied on its accountant, is also meritless. Reliance on a tax advisor does not necessarily constitute reasonable cause for the remission of penalties (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121). In order to establish reasonable cause, the reliance itself must be reasonable (Matter of BAP Appliance Corp., supra). In evaluating whether the reliance was reasonable, the taxpayer is required to show that he acted with ordinary business care and prudence in attempting to ascertain his tax liability (Matter of A & V Crown, Tax Appeals Tribunal, May 24, 1990). Petitioner must also demonstrate that the advice came from a competent tax advisor (id.). In this instance, the record does not establish that petitioner acted with ordinary business care and prudence in attempting to ascertain his tax liability or that reliance upon Mr. Freedman was reasonable. Therefore, petitioner has not shown that the omission was due to reasonable cause.

W. The petition of Christian Bleistein, officer of Second Street Deli, Inc., is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 26, 1989, is sustained together with such penalty and interest as may be lawfully due.

DATED: Troy, New York
October 6, 1994

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE